BEFORE THE ENVIRONMENTAL APPEALS BOARD

OF THE STATE OF DELAWARE

IN RE: THE APPEAL OF ROBERT A. RALEY AND THE DELAWARE RECREATIONAL ASSOCIATION	)	Appeal No. 90-15, 90-16
	)	February 7, 1991

DECISION AND FINAL ORDER

On October 23, 1990 the Environmental Appeal Board ("The Board") held a hearing on the above referenced appeals. The panel consisted of Joan Donoho, Edward Cronin, Clifton H. Hubbard, Richard Sames, Ray Woodward, Mary Jane Willis, members and Thomas J. Kealy, chairman. Appellant Robert A. Raley ("Raley") was represented by John A. Sergovic, Jr. and the Delaware Recreational Association ("The Association") was represented by Althea E. McDowell. Jeanne L. Langdon appeared for the Department of Natural Resources and Environmental Control ("The Department") Deputy Attorney General, Joseph Patrick Hurley, Jr., advised the Board.

Questions Presented

Raley claims to hold "vested rights" to complete construction at the Boat Hole Marina without complying with the new Marina Regulations issued March 29, 1990, and adopted April 1, 1990, based upon certain permits obtained, contracts entered, and work actually done before the issuance of the regulations. He also contends that the Department lacks legislatively delegated authority to regulate marinas and therefore the adoption of the regulations is ultra vires. Subsumed in this argument is the contention that in some

parts the regulations are inconsistent with statutory directives and thus are beyond any granted regulatory authority. The appeal of the Association of which Raley is a member echo's these contentions, and the Association argues additionally that the regulations are too vague, uncertain, indefinite, inconsistent and discretionary as to render them unenforceable under the due process clause of both the Delaware and United States Constitution, and that the compensation/mitigation requirements of the regulations constitute an impermissible tax.

Summary of Evidence

The Board received into evidence a copy of the Chronology dated April 27, 1990 including the appeal letters of Raley and the Association. Thereafter, Raley testified both by affidavit and in person. The appellant indicates he owns and operates the Boat Hole marina located on Love Creek in Sussex County, Delaware. As it existed in March 20, 1989, the date that the Governor's Marina Moratorium went into effect, the marina consisted of a boat basin, access channel, 4 launch ramps, 43 floating docks and 76 boat slips. In connection with the marina operation, Raley claims to hold title to private subaqueous lands created pursuant to permits issued by the Department in 1974 and 1975. According to the witness, he had plans to expand the marina operation if, as, and when his research indicated the demand was adequate and the market would support the expansion.

Among the exhibits offered by Raley relating to the expansion is a sediment control plan dated April 28, 1987 and a fire

protection study and approval dated November 10, 1987. The appellant's letter of January 11, 1989, (sic) refers to an original conception plan dated April 7, 1976, and a site plan for the facility approval by Sussex County Planning and Zoning on December 17, 1987. The appellant obtained building permits on December 30, 1988, and March 9, 1989, and March 10, 1990. On March 7, 1989, Raley entered into a construction contract with W. Paynter Sharp and Son, Inc., regarding a 1200 dry stack slip building. The contract was, "subject to all rules, Regs & Permits". Apparently Paynter Sharp had been the contractor who drove test piles for the project in September of 1984. Thereafter Raley contracted on March 20, 1989, with Roof and Rack of Boca Raton, Florida for the supply of a 192 unit Dry Stacker building and the erection of the building above the foundations. In May and June of 1989, Raley had Leidy Engineering perform engineering services regarding the design of the fork lift area of the floor for the dry stack building. According to another exhibit fill dirt was trucked to the site in late October and early November of 1989. An elevation study was done by Mann Associates on or about February 15, 1990 and thereafter, site preparation work was performed by Nicols Landscaping culminating in the pouring of concrete footers on or about March 29, 1990.

During the time between the moratorium in March of 1989, and the issuance of the Marina Regulations in March of 1990, Raley testified he attempted on several occasions to obtain from the Department a clear statement that his project was not subject to

the regulations which at that time were being developed.

According to the witness, he talked with Zimmerman, Espisito, and Cooksey of the Department in an attempt to determine if he was "grandfathered". He said he received letters from the Department which never said anything either way. He indicated it was his belief that he had all the appropriate permits but didn't want to start and then get a cease and desist order. The appellant did participate in the public workshops held during the development of the regulations believing that he had something to offer but felt that the Department did not want to listen to him.

Regarding the issue of grandfathering, Raley testified that the draft regulations dated January 29, 1990, contained language to the effect that construction, not defined to be an alteration subject to the regulation, "must be significant and be completed within six months". Raley at one of the public work shops indicated 6 months was an inadequate time and completion should be permitted as allowed under the building permits for the work. Mr. Espisito's letter of February 22, 1990, apparently delivered to Raley at the public hearing on the regulations held that evening, indicates that significant constructions could mean, that the foundations of any proposed structures are already in place. The letter also indicates the proposed construction may be an alteration under the draft regulations, and that the Department could not provide a definitive answer until the final Marina Regulations were promulgated. Also attached to the February 22, 1990, letter is a copy of a letter dated May 18, 1989 from Robert

Zimmerman to Raley indicating that his contemplated ramp construction for off loading boats into Love Creek at the Boat Hole Marina was within the moratorium. Raley testified that the flurry of construction activity culminating in the construction of the footers was designed to bring his project within the anticipated safeharbor. The regulations as adopted and Mr. Espisito's letter of April 5, 1990, make it plain that only things actually in existence as of the date of the regulations did not require permits.

Raley further testified that he has not applied for a permit or attempted to comply with the regulations because he believes he does not have to and secondly if he applied he could not comply with the new requirements and therefore could not get a permit. Raley testified he did not know of the moratorium when he signed the contracts in March of 1989.

The Delaware Recreational Association, also appeared by its attorney and entered in evidence its memorandum of law and supporting appendix. The appendix contained an affidavit of two of its members establishing a substantial economic investment in existing marina facilities which they claim would be adversely affected by the new regulations. Specifically they contend that the regulations will increase the cost of operation, curtail use of property, and as to the mitigation requirements potentially deprive them of property. In their presentation, the Association advances the position that the regulations are ultra vires in that they were adopted by the Governor and that the legislature never authorized

the regulation of marinas by any legislative act. While the Association concedes the generalized right in the Department to regulate air and water they contend that since the legislature has failed to delegate the authority to regulate marinas, the Department has usurped the legislative function. This is evidenced by the complete lack of any standard or guidelines within which the regulations can be fitted. This causes the regulations to 1) be conflicting both internally and with other specific statutory pronouncement in the environmental area; 2) to exceed the lawful power delegated to the Department by virtue of incorporating regulations of other state and national agencies as well as delegating to itself the right to amend or modify them; 3) to be confiscatory by requiring compensation or mitigation; and 4) be otherwise vague and overboard by failing to give fair notice to existing marinas of what is required under them. All of these problems would have been addressed had the legislature set the standards and guidelines in an appropriate delegation so the argument goes. In its presentation, the Association cited two particular examples of each of the evils to be found in the regulations. For example, the Association points out that the Notice and Hearing procedures in Chapter 27 of Title 7 differ significantly with the regulations notice and hearing procedures. Reg. 1.C.3.b. Also enforcement provision in Chapters 19, 62, 66, and 72 are in conflict given their application in the marina regulation. Reg. I.B.5.b., I.C.5. The Marina Regulation's adoption and use of the regulations and codes of other agencies

such as the Department of Public Health and the fire codes are noted as examples of the lack of appropriately delegated authority to the Department and the illegal delegation by the Department to itself to fill the void. The Association in paragraphs numbered C.(i) thru (XXXii) in its Notice of Appeal sets out specifically the Associations complaints regarding the regulations as they relate generally to the Association's contentions.

Thereafter, Donna Porter, an employee of the Department was sworn and testified that she works for Sarah Cooksey, the principle drafter of the regulations. Ms. Porter indicated part of her duties were clerical and that she mailed drafts of the regulations to the workshop participants and maria owners. She testified she mailed on March 29, 1990, notices of the final regulations to legislators and to the Governor's office.

Thereafter, Sarah Cooksey, the program manager for the Department was sworn and testified. She is the primary drafter of the regulations in issue. She has a masters degree in biology, 12 years of regulatory and enforcement experience with both the Environmental Protection Agency and the Food and Drug Administration in Washington before coming to the Department approximately two years ago. She owns a boat. The regulations were drafted with the assistance of an outside contractor. The regulations of other states were surveyed. Eleven public meetings were held garnering input for the regulations from the marina industry, environmentalists and the public at large. There were significant and substantial changes in the various drafts as a

result of the input from the interested parties.

Ms. Cooksey testified that generally the regulation of marinas before the instant regulations were issued had been accomplished under the general permitting process in existence under the various provisions of the Department of Natural Resources and Environmental Control. The Marina Regulations were designed to bring the various permitting requirement under one umbrella, a sort of one stop shopping arrangement.

Regarding the "grandfather" clause, Ms. Cooksey indicated that by virtue of the definition of alteration there did in fact exist a grandfather provision. It is not as broad as the one contained in the draft regulations. In making the change between the draft and final regulations, the concept of "significant prior construction" was omitted because the department believed only things actually in existence at the time of the adoption of the regulations should be grandfathered and that those projects under construction should be constructed and completed in accordance with the regulations.

She further testified that no legal memorandum about the authority to regulate in this area was even requested or prepared. In general, she added that the regulations were not so vague that a marina operator would not know what is required of him.

As to the Operation and Maintenance plans she indicated that they were designed to ensure compliance with existing environmental statutes by marinas and that the guidebook was designed to be a helpful tool for use by marinas to know and comply with the laws'

requirements. She indicated that the existing law, statutes and regulations still control, however.

She next addressed each of the thirty plus specific objections to the regulations contained in the Associations, April 20, 1990, appeal.

Particularly with regard to objection, (c)(i), and the complaint that the Department may maintain a Marina Guidebook, Ms. Cooksey testified that the book published in August of this year is merely an educational aide whose use is permissive. The Board finds specifically that there is nothing ambiguous or vague about this particular provision.

In regard to the allegation in c(ii) that the Department is regulating beyond its authority in the area of non subaqueous private lands which is beyond the bounds of 7 Del. C. 7203(b) and 7213, Ms. Cooksey indicated that the reach of the regulations is limited as stated in part B of the regulations to facilities on or adjacent to the water and that Chapter 60, along with Chapter 72 provide ample authority for these regulations.

The witness responded to the notice complaint, (c) (iii) that the statute was viewed as setting a minimum standard not a maximum one. The notice provision while different from that contained in Chapter 72 is generally in accordance with other notice provisions in Title 7.

The Department concedes that the provision of Section I. B.5.(b) are inconsistent and the witness indicated it would be corrected.

In c(v) the Association claims the requirement of compensation in Section (f) of the regulation constitutes an impermissible tax. The Department is authorized by statute, in section 7205 to require measures which will offset or mitigate the loss. The Department is also authorized to set fees for permits and receive the funds therefrom. According to the witness the use of the word "compensation" as set out in the regulations is intended to reach only the lease fee, and only when chapter 72 is in play.

The complaints stated in paragraph c(vi) and (vii) deal with the concept of mitigation as set out in regulation section II.D.10. (a) thru (d). The Associations claims it to be an impermissible tax. It is their position that any mitigation should go to an owner for a taking rather than from an owner in exchange for granting a permit. The witness explained the Department's theory on this issue. Each permit is site specific and the regulations are designed first to avoid damage to wetlands and then secondly, to mitigate damage for any change or disturbance caused by marina development. The witness acknowledged private individuals can own wetlands while the Department is charged with regulating any activity in the wetlands. The Department specifically relies upon the broadly expressed grant of authority and liberal construction to be given Chapters 66 to support the mitigation requirements.

Objection numbers (viii) thru (x) also deal with the Operation and Maintenance (O and M) plan required by regulation section IV.B. The Association claims that the O and M plan requirement is contrary to 7 Del. C. 7713 and that parts of the regulations are

vague.

The witness indicated the O and M plan was not an attempt to retrofit all existing marinas. The regulation was intentionally not made specific to allow an applicant reasonable leeway to comply with existing requirements. According to the Department, the only basis to deny an O and M plan is if it is out of compliance with present statutory requirements.

The next objection number (xi) is that the preapplication review procedures are vague and drafted in such a way as to permit or encourage enforcement in an arbitrary and capricious way. The Department responded that the term "sound scientific principles" has a generally accepted meaning and that the areas of concern deal with things that by their nature are only broad categories and that it would be impossible to list all that could impact on a specific site and the various standards applicable to such numerous concerns. It was left for the individual site to be examined on a case by case basis and for the applicable needs and the particular standards appropriate to a given project to be determined on an application by application basis.

In objection (xii) the regulation is claimed to be ultra vires on the basis that no legislative authority exists to incorporate fire codes into the Marina Regulations and secondly that such codes are unnecessary to the purposes of Chapters 19, 60, 66, and 72. The Department countered that fires damage the environment and are safety hazards to public; the codes are appropriately imposed by the State Fire Marshall's Office and that this part of the

regulations applies only to new marinas.

In the face of the Association's next argument that the regulations delegate approval authority to other agencies the witness said Section I.G. was included as a reminder in general to applicants of other compliance requirements which may exist and that 7 Del. C. 6003(c) provides specifically for this type of requirement as least as to land use plan and zoning.

Objections (xiv) and (xv) are predicated on the idea that the Department has adopted requirements based upon insufficient scientific or factual evidence and has vested unbridled discretion in itself based upon such erroneous grounds. See Exhibit B, to the Association's Exhibit 1-B. The witness indicated that the Environmental Protection Agency's handbook on marina design was the source of these presumptions which were rebuttable but consistent with the purposes and objective's of the regulations.

The Department contends the criteria and standards governing what is least environmentally damaging are again site specific but that the regulations list adequately the factors to be considered allowing the department through the permitting process to discretionarily elect the least environmentally hazardous alternative. The Department concedes that some projects could by virtue of their size and scope based upon scientific experience be so environmentally damaging that no permit would issue. The basis for such a determination would be reviewable by this Board and then the courts.

Complaint (xvi) raises the issue of the Department's authority

to impose a one acre limitation on wetlands disturbance. The witness in part indicated this part of the regulation was designed to implement the water quality standards and the stated policy of the state regarding wetlands.

The Department is next alleged in number (xvii), to have impermissibly delegated authority to issue or deny permits to the Department of Public Health without appropriate authority, standards or without complying with due process requirements. The Department countered that the Food and Drug administration already regulates shellfish closures zones and that the regulation only requires marinas to be in compliance with those existing provisions. There is no impermissible delegation according to the Department.

In (xviii) according to the association there is no basis, in legislative authority, for the "benthosis" to be a basis for issuance in denial of a permit. Chapter 60 of Title 7, according to the Department, is an ample source to require a benthic assessment because it is an indicator of the environmental health of an ecosystem. Fish, shellfish, crab and fowl rely upon it as a food source.

Next in number (xix), the Department authorizes itself to change the methodology it uses in making assessments. According to the Association, a public hearing is required. The Department responded that if as experience is gained a change in methodology is warranted a public hearing will be held as required by law.

Paragraph (xx) alleges that "critical habitats" is vague

indefinite and without established criteria thereby setting an arbitrary standard for evaluating permits. The Departments says the term is defined in the definitial section and adequate notice is provided by the regulation.

The next complaint is that Section II. D.8. of the regulations is an impermissible delegation. The response is that as of yet there is no water use plan adapted, and therefore the regulation has no effect until the state adopts such a use plan in which case the sitting must be consistent therewith.

The Department acknowledges that the basis for this next complaint is something left over from a previous draft, is inconsistent and should be removed. See (xxii). The Department also reiterates in response to the complaint in paragraph number (xxiii) that the Marina Guidebook is only discretionary or permissive.

There is a disagreement about the adequacy of the hearing record for support of the regulation limiting marinas to those areas not requiring frequent maintenance dredging. The Department contends principally that the dredging destroys or negatively impacts the benthic community as the record is adequate to support this conclusion.

In (xxv), the upland parking requirement of .5 spaces per new slip is said to lack support factually or scientifically; and to be an encroachment on other local jurisdictions who have zoning authority over uplands. The Department notes that the .5 requirement comes from the marina industry and it is only a

presumption which can be rebutted by an applicant.

Issue number (xxvi), deals with the requirement in the regulation that water quality monitoring be done. No standards are set out which state what is an ecologically sensitive area. The witness responded the regulation requires evidence that water quality standards may be violated before monitoring may be required in site specific areas.

In complaint number (xxix), the association alleges undefined emergency conditions present the potential for modifying regulations in a fashion so as to deny applicants equal protection of the laws. The Department agrees that this section permits a waiver of regulations but it would not be applied in a arbitrary or capricious way.

In paragraph (xxx), the complaint is made that section II.C.4. gives to the Department unbridled discretion to deny permits where permits are otherwise available. The Department contends the report and appeal procedure protect the applicant's interest and any denial must be based upon the environmental impact.

In number (xxxi), the regulations in their entirety are said to be vague establishing arbitrary and capricious authority over private property and because they are based upon cumulative authority beyond any valid legislative delegation. They are thus ultra virus. The witness replied that marinas are a multi-media business which had in the past been subjected to piecemeal regulation and that these regulations do not expand or contract the authority already existing but merely compiliate the regulatory

schemes into one for the benefit of the applicant, the department and the environment.

The final complaint, (xxxii), again alleges the Marina Regulations to be an invalid attempt to regulate uplands. The regulations are said to be founded generally upon insufficient data and scientific evidence. The Department denies any attempt to regulate beyond its authority and again points to the applicability section which says the reach of the regulations is to facilities on or adjacent to the water.

The witness lastly indicated the one application processed to date was for a state boatramp.

APPLICABLE LAW

The authority for the regulations as cited in regulation I.B.4. is found in:

> "7 Delaware Code, Chapter 60, The Water and Air Resources Act, 7 Delaware Code, Chapter 72, The subaqueous Lands Act, 7 Delaware Code, Chapter 66, The Waterlands Act, 7 Delaware Code, Chapter 19, Shellfish."

For our purposes, from Chapter 60 we note particularly the findings and policy stated in 7 Del. C. 6001; the definitions found in section 6002(1), (3), (11), (12), (15), (16), (18), (19) (2), (23), (24), (26), (27), (38), (45) through (53); the permitting provision found in 7 Del. C. 6003; and the delegation of authority found in section 6010[1]. Section 6020 requires liberal

[1]We are aware of the amendment to section 6010(a) enacted by 67 Del. Laws c. 344 effective after the adoption of the regulations in issue. We view the change as a restatement of the scope of the

construction to effectuate the purposes of the act and section 6035 specifically covers aspects of publicly and privately owned marinas or boat docking facilities.

From the Wetlands Act, we are guided by the purposes therein stated in section 6602 particularly the thought that both private and public wetlands are to be preserved and protected from despoliation and destruction consistent with historic rights of private ownership. The definition of "activity" and "Wetlands, as well as the permitting provisions in the act particularly the factors which the secretary is directed to consider, in section 6604 b (1), (3) and (4) are pointed out. We are mindful here again of the liberal construction to be given the act, the authority to adopt regulations and particularly the authority to adopt standards which are consistent with section 6604 but yet which may be variable from area to area. Finally, the provision dealing with compensation for a taking, section 6613 impacts on our decision.

From the Subaqueous Lands Act we note the act's stated purpose as set out in section 7201 including particularly the direction "to place reasonable limits on the use and development of private subaqueous lands", and the delegation of rule making authority to effectuate the purposes of the act. We point specifically to the definition of "commercial project" found in section 7202(a) and the jurisdiction granted over private subaqueous lands in 7203(b). The permitting section, 7 Del. C. 7205 because of its importance to

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authority originally delegated.

our conclusion is set out below.

> "No person shall deposit material upon or remove or extract materials from or construct, modify, repair or reconstruct, or occupy any structure or facility upon submerged lands or tidelands without first having obtained a permit, lease or letter of approval from the Department to protect the interests of the public. The Department may adopt regulations setting fees for such permits. If it is determined that granting the permit, lease or approval will result in loss to the public of a substantial resource, the permittee may be required to take measures which will offset or mitigate the loss. This section shall not apply to any repairs or structural replacements which are above the mean low tide which do not increase any dimensions or change the use of the structure. (65 Del. Laws, c. 508, 2.)

We are also mindful of both sections 7212 and 7213 granting the department the authority to make rules and delegate powers as well as the direction that existing property and reparian rights are unchanged.

Lastly, we note the portion of the law dealing with shellfish, and the delegation of rule making authority contained therein to preserve and improve the shellfish industry and resources in the state.

The principles of law governing a public administrative agency's ability to issue regulations are set out in the cases of Burpulis v. Director of Revenue, Del. Supr., 498 A.2d 1082 (1985). In re Appeal of Dept. of Natural Resources, Del. Super., 401 A.2d 91 (1978), State v. Braun, Del. Super., 378 A.2d 640 (1977) and Wilmington Country Club v. Delaware Liquor Commission, Del. Super., 91 A.2d 250 (1952). They are dispositive of this appeal. "An

administrative regulation will carry the force and effect of law so long as it does not exceed the scope of the statute and is with the rulemaking authority of the Secretary. . ." Burpulis at 1085. An agency may not under the guise of rule making legislate by adopting a rule or regulation which alters extends or limits the Act, or which is inconsistent with the clear legislative intent as expressed therein. Wilmington Country Club at 255, In re Appeal of Dept. of Natural Resources at 96. The legislature may declare policy and announce legislative principles but delegate to an administrative body authority to apply those principles and where that discretion involves an exercise of the police power the delegation may be cast in general terms. ibid, at 95. In addition to these general precepts we note that in the environmental field statutes directed at the control of air pollution cannot be expected to scientifically delineate all proscribed contaminants and pollants and are intended to be flexible and adaptable since they are intended to encompass infinitely variable conditions and factual situations which could not have been foreseen by the General Assembly. State v. Braun, supra. at 643. Lastly then Judge Christie wrote that the Water and Air Resources Act, 7 Del. C. 6001 it seq. (1977) was designed to allow the state to control development and use of land, water, and underwater resources of the state to effectuate utilization, conservation and protection of state resources.

In Atlantis I Condominium Ass'n v. Bryson, Del. Supr., 403 A.2d 711 (1979). Our Supreme Court noted that authority granted to

an administrative agency should be construed to permit the fullest accomplishment of the legislative policy.

> "An express legislative grant of power or authority to an administrative agency includes the grant of power to do all that is reasonably necessary to execute that power or authority" Kreshtool v. Del. Marva Power and Light Co., Del. Super., 310 A.2d 649 (1973). Such implied power may include the power to require a license in an appropriate situation where licensing is "...incident, implied, a necessary and proper in light of the objectives and the power granted..." (Citation omitted) 403 A.2d 713.

The Supreme Court further explained that a delegation of discretion as embodied in the Subaqueous Lands act, The Wetland's Act and the Shellfish Act will survive scrutiney only if adequate safeguards and standards to guide the discretion are found in or can be inferred from the statute.

FINDINGS AND CONCLUSION OF LAW

Applying these precepts to the statutes aforesaid we are certain that the delegated statutory authority supports the regulation of marinas. We find specifically that the regulations say and they are in fact limited to facilities including marina's which are "on or adjacent to the water". Such facilities due have the propensity to pollute the air and water resources of the state and negatively effect the states environment.

Marina's and the boat traffic they generate raise the risk of accidental and deliberate discharge of pollutants, contaminants and garbage into the water. It is further apparent that the regulation of the highly sensitive environments mentioned in the various acts as well as the air and water in general, is a complex and changing

task dependant upon many variables including changing technology. While we find the standards expressed adequate and easily understood their accomplishment requires an expertise and attention to detail by and all those but the most knowledgeable and well read of the field. For example the regulation says the siting and design study for new marinas shall be based upon sound scientific principles." Reg. C.3.a.(2). Given the various factors impacting specific sites and the changing technology it would not be practicable for the legislature to lay out the existing technology in a statute which may be adequate to protect the environment of a site on the Delaware river but disastrous to another different site in a marshy area of the Rehoboth bay. We believe as required in delegations of this type that the statutes involved, and the regulatory scheme contain adequate standards and sufficient protections to pass review.

The regulations contemplate an appeal from the negative aspects of the Secretary's decision by any person whose interest is substantially affected. The appeals process is first to this Board and then into the court system as contemplated by the statutes. These review processes also allow for public input and variances. These measures appear to us to offer adequate protection and sufficient procedural safeguards against potential arbitrary and capricious administrative conduct under the regulations.

Complaints about the inclusion of regulatory provisions dealing with fire codes, health codes, zoning codes and the like are in our opinion not well founded. These inclusions seems to us

consistent with the objectives of the environmental statutes and are things that generally an applicant must be in compliance with under the law. To issue permits to applicants whose facilities are in violation of other codes whose violation could negatively impact the environment would be contraindicated. The specific regulation in Section I.G. we find to be no delegation at all, merely a requirement that the applicant demonstrate compliance with whatever is required under these laws.

The Association's claim regarding the notice and enforcement provisions, too seem ill conceived. While the notice provision in the regulations is different from that in 7 Del. C. 7207-7209, it is consistent with the goal of the statute to allow fair public comment. Rather than shorten the time below that established by the legislature solely for the application for a lease of subaqueous lands, the regulation reasonably extends it for consideration of a broader spectrum of issues. If as we have determined the licensing of marina's is permitted, then a fair notice requirement would be a necessary adjunct to the exercise of that authority.

The enforcement provisions don't appear to us problematic. The Association postulates that a violation of Chapter 72, can be enforced through the enforcement provisions of Chapter 66. Assuming this were the case, it might present a case for arbitrary and capricious administrative action. However, no factual claim on this account is presented to us and the Department denies such an intended reach. The Department has consistently maintained that

the Marina Regulations are no more than an analgamative of the existing statutes impacting various aspects of the marina industry. Such appears to us to be the case. To the extent that the regulations reach things or areas not specifically addressed in the existing chapters of the environmental law, we believe that their regulation is necessarily implied to carry out, to the fullest extent, the stated legislative policy. A determination of arbitrary and capricious application of the regulations must await specific presentation for which safeguards and protections exists.

Having found the regulations to be on firm legal footing, we turn now to the claims that Raley and the Association have been deprived of vested rights in existing permits. Raley contends he does not have to obtain a marina permit from the Department to construct his dry stack facility. The members of the association claim O and M plan requirements for existing facilities might possibly result in revocation of rights under existing permits. Neither Raley nor any association member has made application for a license under the regulations, no permit application, or license has heretofore been either denied or revoked. The appellants rely upon the cases Shellbourne, Inc. v. Roberts, Del. Supr., 224 A.2d 250 (1966), Wilmington Materials, Inc. v. Town of Middleton, Del. Ch., C.A. No. 10392 - NC (Jacobs, V.C., December 16, 1988); Dragon Run Farms, Inc. v. Bd. of Adjustment of New Castle County, Del. Super., C.A. No. 88 A JA-21 - AP (Stiftel P.J. August 11, 1988); and Miller v. Board of Adjustment, Del. Super., 521 A.2d 642 (1986).

The Department contends that the vested rights doctrine upon which Raley and the Association rely is a concept of zoning law which has not been applied by Delaware outside of zoning law; and in State v. Brown, Del. Supr., 378 A.2d 640 (1977), the Delaware Supreme Court rejected its application in the environmental field. The Department contends that most of the hardship caused in this case was Raley's own doing. While we are not prepared to say that the vested rights doctrine may never be applied in appropriate circumstances in the environmental arena, we are aware that the Courts have said there is no vested right to use property to discharge contaminants and no vested right to continue causing injury even when such "injury has occurred in the past. State v. Brown at 645. Having reviewed the claims made by Raley and the Association and their supporting authority, we are satisfied that the regulations do not deprive him or any member of the association of any vested rights they may possess.

The vested rights doctrine is similar to but different than the doctrine of equitable estopped but the courts have often applied them interchangeably. The elements which must be shown, taken from Miller v. Board of Adjustment of Dewey Beach, supra are:

> "(1) A party acting in good faith, (2) on affirmative acts of a municipal corporation (3) makes expensive and permanent improvement in reliance therein, and (4) the equities strongly favor the party seeking to evoke the doctrine."

According to Amico v. New Castle County, D.Del, 101 F.R.D. 472 (1984), The Delaware Courts have further limited estoppel where to do so would operate to defeat the effective operation of a policy

adopted to protect the public. We also understand that what constitutes "substantial sums" or what rises to the level of expensive and permanent improvement within this concept is a fact driven inquiry which must be made on a case by case basis. In our view, taking Raley at his word, he had an idea or a plan to expand the Boathole marina if, as and when research indicated demand was adequate and the market would support the expansion. To that end, from time to time, Raley undertook various steps, which we call preliminary to the proposed expansion. While clearly some expenditures were made in furtherance of this project, the activity resulting in the contractual undertaking with W. Paynter Shamp and Son, Inc., on March 7, 1989, for $210,267.00 and with Roof and Rack on March 20, 1987, for $240,856.00 very shortly before the moratorium went into effect was not. We do not believe that Mr. Raley did not know of the coming moratorium. But whether or not he knew is immaterial since there is no proof that any expenditures in furtherance of those contracts was made, incurred, or required. The Paynter Sharp contract is specifically, subject to all rules Regs and Permits. We do find that expenditures made or work done after the moratorium went into effect were not done in good faith within the meaning of the vested rights doctrine including particularly the concrete footing work. In sum we hold that Raley has failed to show he expanded substantial sums or made expensive permanent improvements so as to warrant the operation of the doctrine. Nor do we find that as to the two contracts entered into in March of 1989, or as to any expense incurred after March 20,

1989, Raley acted in good faith.

We also find that another element is lacking; that being reliance upon an affirmative act of a municipal or governmental entity. On this issue Raley indicated he sought on numerous occasions from various individuals assurances that the regulations would not apply to his proposed project. He never received any such assurance and was in fact told the outcome was unknown until the final regulations were promulgated. These circumstances do not constitute any assurance, while in Dragon River Farms and Wilmington Materials, Inc., supra, positive affirmative assurances were made including the issuing if a legal opinion which induced reliance by the landowners.

Finally, the equities do not favor Raley. In Wilmington Material, Inc., the Vice Chancellor specifically found that Wilmington Material was the sole person at whom the zoning amendment was directed and the intent of the amendment was to prohibit Wilmington Material's proposed use. The court said the amendment was not adopted out of police power considerations but in response to a vocal local protest. In Dragon Run Farms, the landowner expanded some 750,000.00 dollars to acquire the property based upon a legal opinion of a government attorney that it could be used as contemplated. None of those consideration is present here. These regulations are not aimed at Raley individually, and are clearly adopted out of police power considerations and concern for the environment. A waiver of the regulations requirements would frustrate the public policy. More importantly, no one has

said Raley can't use his property as contemplated. To be sure there are additional requirements now, but no prohibition to the use of the property has been established.

What we have said here applies equally to the Association. Their chief complaint is that "...revocation of existing vested rights is possible". Exhibit 1-A at page 30. The principle vehicle for this probability is the O and M plan requirement which applies to existing marina facilities. While we have no doubt that existing marinas have expended substantial funds and hold existing permits, we fail to see how the holding of State v. Brown can be overcome in this context. Additionally, we have the Department's testimony which says that the only reason to deny an O and M plan is because it is violative of some existing statutory directive. Based upon the foregoing no deprivation of any vested right is made out. It may well be that the Department's denial of an O and M plan might when made raise the issue in some concrete particular way. But in the absence of this type of evidence, we fail to see how the requirement alone disenfranchises any existing right.

The remaining matter before us is the one dealing with the compensation/mitigation requirements. The Association correctly points out that 7 Del. C. 6613 contemplates that a denial of a permit for use of wetlands can result in the taking of private property. To our way of thinking, the regulations do not nor could they invalidate the provisions of 7 Del. C. 6613. If an application for a permit under the Marina Regulations denies a land owner the use of private wetlands under factors such as those in

Loveladies Harbor, Unit D, Inc., v. United States, 21 Cl. Ct. 153 (1990), or others, and the Superior Court so holds, then the permit must be granted or a taking effected as dictated by the statute. But the Department correctly points out that the assertion of regulatory jurisdiction by the State does not in and of itself constitute a taking. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). Agino v. Tiberon, 447 U.S. 255 (1980). The appellants have again only postulated that, "marina owners and operators may be denied all viable use of their properties, thereby having their property taken without compensation rendered to them". Association Exhibit 1-A at page 16. We fail to see how this could in fact happen given the clear statute and the protections found in the regulations. But the denial of the use of privately owned lands is a vastly different case from one where a person is seeking a permit to encumber state owned or public waters to which he has no absolute right. Seven Del. C. 7205 specifically provides for the imposition on the permitee of measures which will offset or mitigate the loss where granting a permit would result in loss to the public of a substantial resource. On this record, the mitigation requirement to us seem both reasonable, and consistent with directives delegated to the Department without negating the concept that existing property, riparian and other rights shall not be changed.

Nor do we believe that the fee structure in regulation I.C. 4. is per say invalid. The regulation requires by its term that the fee schedule be adopted and maintained as provided by Delaware Law.

Appellant contends that the case of In Re Opinion of The Justices, Del. Supr., 575 A.2d 1186 (1990), requires the concurrence of three-fifths of the general assembly of the State to increase or charge new fees. The regulation requires that the adoption of the fee schedule be in conformity with Delaware law. There is no evidence in the record to indicate that a schedule has been or will be adopted in any manner other than in compliance with the requirements of the law.

CONCLUSION

The Board finds by unanimous vote that the Marina Regulations are lawfully adopted based upon the legislatively delegated authority as set out in Regulation I.B. 4. We have also carefully reviewed each of the allegations of appellants and based on this record find that no vested rights have been destroyed nor any taking of private property affected by the adoption of the regulations. We hold the regulations consistent with the public policies and goals of the Delaware Environmental law as enacted by the legislature and are thus, valid and enforceable.

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